

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES I. WYATT,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Civil No.13cv1972 WQH (NLS)

**REPORT AND
RECOMMENDATION FOR
ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

(Dkt. Nos. 12 and 15.)

James I. Wyatt (Plaintiff) brings this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of the Social Security Administration (Defendant) denying his claim for disability insurance benefits. (Dkt. No. 1.) This case is referred for a Report and Recommendation on the parties' cross-motions for summary judgment. *See* 28 U.S.C. § 636(b)(1)(B). After careful consideration of the moving papers, the administrative record, and the applicable law, the Court **RECOMMENDS** that Plaintiff's motion for summary judgment be **DENIED** and that Defendant's cross-motion for summary judgment be **GRANTED**.

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I. Background

A. Evaluation of a Disability Under the Social Security Act

To qualify for disability benefits under the Social Security Act, an applicant must show that he or she cannot engage in any substantial gainful activity because of a medically determinable physical or mental impairment that has lasted or can be expected to last at least twelve months. 42 U.S.C. § 423(d). An individual claiming disability must prove he was permanently disabled or subject to a condition which became disabling prior to his last insured date. *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). The Social Security regulations establish a five-step sequential evaluation procedure for determining whether an applicant is disabled under this standard. 20 C.F.R. § 404.1520(a); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1194 (9th Cir. 2004).

First, it must be determined whether the applicant is engaged in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If not, the second step is to determine whether the applicant is suffering from a “severe” impairment within the meaning of the regulations. 20 C.F.R. § 404.1520(a)(4)(ii). If the impairment is severe, the third step is to ascertain whether it meets or equals one of the “Listing of Impairments” in the Social Security regulations. 20 C.F.R. § 404.1520(a)(4)(iii). If the applicant’s impairment meets or equals a Listing, he or she will be found disabled. *Id.* If the impairment does not meet or equal a Listing, it is then determined whether the applicant retains the residual functional capacity (RFC) to perform his or her past relevant work (step four). 20 C.F.R. § 404.1520(a)(4)(iv). If the applicant cannot perform past relevant work, step five considers whether the applicant can perform any other work that exists in the national economy. 20 C.F.R. § 404.1520(a)(4)(v).

While the applicant carries the burden of proving eligibility at steps one through four, the burden at step five rests on the agency. 20 C.F.R. § 404.1560(c)(2); *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003). Applicants not disqualified at step five are eligible for disability benefits. *Id.* In making the determinations, “the ALJ

1 [Administrative Law Judge] has a special duty to fully and fairly develop the record and
 2 to assure that the claimant's interests are considered." *Brown v. Heckler*, 713 F.2d 441,
 3 443 (9th Cir. 1983) (alteration in original).

4 **B. Procedural History**

5 Plaintiff James Wyatt applied for Social Security disability benefits on October 20,
 6 2009. AR 27. His application was denied on January 11, 2010, and that decision was
 7 affirmed on request for reconsideration on May 27, 2010. AR 86, 93. Plaintiff then
 8 requested a hearing by an Administrative Law Judge (ALJ). AR 100. Based on
 9 testimony given at the hearing and documentary evidence in the record, the ALJ issued a
 10 decision denying Plaintiff disability benefits. AR 23-42. Plaintiff's application for
 11 review by the Social Security Administration Appeals Council was denied, finalizing the
 12 ALJ's decision. AR 6. Plaintiff now seeks judicial review of that decision. (Dkt. No. 1.)

13 **C. Relevant Documentary Evidence**

14 Plaintiff suffered a workplace back injury in 2005 while lifting gas canisters. AR
 15 318. He reported to the emergency room and received lower back injections for pain
 16 relief and was discharged. *Id.* Following physical therapy, he returned to his normal
 17 work duty for three years until back pain forced his leave on temporary total disability.
 18 AR 318-19. From 2006 to 2009, Plaintiff's primary doctor was Dr. Bruce Van Dam. AR
 19 319, 444. Upon determining Plaintiff would require a surgery he no longer performed,
 20 Dr. Van Dam recommended Plaintiff obtain a new primary treating physician. AR 444.
 21 Plaintiff chose neurosurgeon Dr. Lokesh Tantuwaya. AR 318. He underwent an
 22 unsuccessful back surgery on January 4, 2010, and a repeat back surgery on December 8,
 23 2010. AR 335, 579. Plaintiff's ability to work following a recovery period from the
 24 second surgery is now disputed.¹

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 27 ¹ Plaintiff underwent psychiatric review by Dr. Khan in January 2010. AR 305.
 28 Dr. Khan found Plaintiff had non-severe depression that did not significantly decrease the
 ability to function. *Id.* Plaintiff's psychiatric health is not at issue here and was not
 raised in his complaint. (Dkt. No. 1.)

1 1. Dr. Van Dam: Primary Treating Physician, 2006-2009

2 Dr. Van Dam was Plaintiff's primary treating physician through 2009, prior to both
3 back surgeries. The diagnosis in a February 2009 report was disk herniation at L3-4.²
4 AR 452. As the treating physician, Dr. Van Dam noted Plaintiff was in severe pain and
5 prescribed a variety of narcotic analgesics such as Percocet and Oxycontin. *See, e.g.*, AR
6 444, 452. In April 2009, Dr. Van Dam informed Plaintiff he would no longer provide
7 treatment.³ AR 445.

8 2. Dr. Tantuwaya: Primary Treating Physician, 2009-2011

9 Dr. Tantuwaya was Plaintiff's treating physician for both back surgeries and his
10 medical reports were given significant weight in the ALJ's decision to discredit
11 Plaintiff's testimony after April 12, 2011. AR 36. Upon assuming care for Plaintiff in
12 2009, Dr. Tantuwaya diagnosed Plaintiff with L3-4 disc protrusion with radiculopathy.⁴
13 AR 467. His recommended treatment was L3-4 laminectomy and discectomy.⁵ *Id.* The
14 diagnosis and treatment plan was consistent with Dr. Lane's, the non-treating examining
15 physician.

16 The first surgery, a left hemilaminotomy L3-4 was performed on January 4, 2010.
17 AR 540. Plaintiff initially reported reduced leg and back pain, and was walking thirty

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19 ²Disk herniation is commonly referred to as a "slipped disc", a defect in the disc's
20 outer wall that allows disc material into the spinal canal. NYU Langone Medical Center, *Lumbar Herniated Disc*, <http://hjd.med.nyu.edu/spine/patient-education/spine-problems/back-and-leg-pain/lumbar-herniated-disc> (accessed June 11,
21 2014). L3-4 identifies which lumbar vertebrae are affected. *Id.*

22 ³ Dr. Van Dam's correspondence indicated he was no longer able to perform spinal
23 surgery or provide patient treatment because of a physical disability. AR 444-45.

24 ⁴ Lumbar radiculopathy is the compression or inflammation of the spinal nerve root
25 that may cause pain, numbness, or weakness. NYU Langone Medical Center, *Lumbar Radiculopathy*, <http://www.med.nyu.edu/content?ChunkIID=886486> (accessed June 11, 2014).

26 ⁵ Laminectomy is a surgery to remove the vertebra surrounding the spinal cord.
27 NYU Langone Medical Center, *Laminectomy*, <http://neurosurgery.med.nyu.edu/patients/common-terms/common-terms-k-m> (accessed June 11, 2014). The similar
28 laminotomy procedure removes only a portion of the vertebra. *Id.* Discectomy is a
surgery that removes part of a protruding disc to relieve pressure on the affected nerves.
NYU Langone Medical Center, *Invertebral Discectomy*, <http://www.med.nyu.edu/content?ChunkIID=112180> (accessed June 11, 2014).

1 minutes daily. AR 530, 535. However, the pain subsequently worsened in his leg and
2 there was no improvement in back pain. AR 525, 530. Dr. Tantuwaya determined the
3 first surgery to be unsuccessful and requested authorization for a revision surgery of
4 “lumber laminectomy at L3-4” with decompression and fusion. AR 511.

5 The second surgery performed on December 8, 2010, was a left L3-4 fusion with a
6 repeat laminectomy. AR 574, 582. Two weeks after surgery, Plaintiff reported no
7 improvement in back pain and was walking just fifteen minutes daily. AR 579.
8 However, at a follow-up exam one month later, he reported improvement of back pain
9 and reduced his use of prescription pain medication from two pills per dose to just one.
10 AR 574. At a February 15, 2011, exam, Plaintiff reported more improvement with leg
11 and back pain and was walking thirty minutes at a time. AR 569. He was still
12 experiencing pain in his left shin and at the incision wounds. *Id.*

13 At an exam on March 15, 2011, Plaintiff reported reduced pain in the leg and back,
14 rating it a three out of ten pain level. AR 564. Dr. Tantuwaya determined Plaintiff was
15 in stable condition and ordered continued physical therapy and use of a bone stimulator.
16 AR 564, 567. On April 12, 2011, Plaintiff reported reduced, but still present, leg and
17 back pain. AR 559. He also continued physical therapy for strength building and walked
18 thirty minutes daily. *Id.* At this exam Dr. Tantuwaya approved a return to modified work
19 that excluded “lifting more than 30 pounds or repetitive or prolonged bending, twisting,
20 or stooping at the waist level.” AR 562.

21 The final post-operative checkup in the record was on May 17, 2011. AR 554.
22 Plaintiff reported more lower back pain, and that his medication only works for four to
23 five hours. *Id.* Plaintiff also expressed interest in returning to some form of work, but
24 different from his previous occupation. *Id.* Dr. Tantuwaya encouraged continued
25 walking as exercise and use of the external bone stimulator. AR 557.

26 3. Dr. Lane: Non-treating Examining Physician, 2009-2011

27 Dr. John Lane’s medical reports from 2009 through 2011 were in the context of

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1 agreed medical evaluations as a non-treating doctor.⁶ *See, e.g.*, AR 413, 429. In the
2 initial 2007 evaluation he diagnosed Plaintiff with aggravation of lumbar degenerative
3 disc disease, recommending exercise and joint injections for pain. AR 414. Following
4 multiple evaluations in 2009, Dr. Lane determined that non-operative treatments
5 including core-strengthening exercises and injections for pain management were not
6 successful. AR 418, 426. His revised diagnosis indicated a herniated disc with left L4
7 radiculopathy. AR 426. The updated treatment recommendation was a surgical
8 procedure of decompression and lumbar fusion with discectomy at the L3-4 level. *Id.*

9 The next evaluation in May 2010 was approximately four months after Plaintiff's
10 first back surgery. AR 429. Plaintiff reported increased pain and Dr. Lane indicated the
11 surgery had "a very poor result." AR 433. He agreed with Dr. Tantuwaya's request for a
12 repeat procedure with lumbar decompression and fusion, absent an MRI scan finding
13 bone fragmentation. *Id.*

14 Dr. Lane's most recent evaluation was on September 21, 2011, approaching one
15 year removed from the second (repeat) back surgery. AR 603. Plaintiff reported constant
16 mild back and leg pain with occasional sharp pains. AR 612. Dr. Lane determined back
17 fusion was not complete and may even require additional surgery. AR 615. Plaintiff
18 reported "substantial problems" with routine activities such as dressing, sitting, walking
19 and sleeping. *Id.* Dr. Lane found Plaintiff had reached permanent and stationary status
20 and was unable to return to his usual occupation. AR 616-17.

21 **D. Hearing Testimony**

22 Plaintiff's hearing before the ALJ took place in May 2011, with appearances by
23 Plaintiff, his counsel Alex Boudov, and vocational expert John Kilcher. AR 45. The ALJ
24 questioned Plaintiff about his daily routine and recovery following the second surgery.
25 AR 59-60. Plaintiff testified he iced his back and used a bone stimulator daily, and was
26 able to walk two to three times per week for fifteen to twenty minutes, though Dr.

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28 ⁶ Dr. Lane first evaluated Plaintiff regarding a separate claim for benefits on
October 1, 2007, stemming from a work injury that occurred in May 2005. AR 414, 604-
05.

1 Tantuwaya recommended walking exercise daily. AR 62. Plaintiff also testified he had
2 trouble sleeping because of the pain, and that his prescription pain medication was only
3 somewhat effective. AR 63-65.

4 Mr. Kilcher discussed Plaintiff's previous work experience as a bellman, cleaner,
5 and truck driver, and opined that he could no longer perform that type of past work. AR
6 68-70. He determined the past work had a RFC of medium and above, which exceeded
7 Plaintiff's current light RFC designation. AR 70. Mr. Kilcher further identified light
8 RFC jobs that exist in the San Diego area and nationally in significant numbers such as
9 assembler, packager, and production inspector. AR 70-72. In response to a hypothetical
10 posed by Plaintiff's counsel, Mr. Kilcher conceded that more than one absence per month
11 would not be acceptable for the suggested light RFC jobs. AR 72-73.

12 **E. ALJ's Written Decision**

13 The ALJ issued a written decision on September 16, 2011. AR 23-42. He
14 determined Plaintiff met the insured status requirements through December 31, 2013, and
15 that he had not engaged in substantial gainful activity since July 10, 2008. AR 30. He
16 also found that between July 10, 2008, and April 11, 2011, Plaintiff was disabled with a
17 severe impairment for "degenerative disc disease of the lumbar spine" and a herniated
18 disc. 20 C.F.R. § 404.1520(c); AR 31. During that time he met the listing for a spine
19 disorder with nerve root damage. 20 C.F.R. Pt. 404, Subpt. P, App. 1, §1.04(a); AR 31.
20 Also, the ALJ found the injury could "reasonably be expected to produce the alleged
21 symptoms" but determined Plaintiff's testimony only credible up to April 11, 2011. AR
22 33-35. Beginning April 12, 2011, the ALJ found Plaintiff's testimony *not* credible (to the
23 extent inconsistent with the RFC) and that he had the RFC to perform light work without
24 standing and walking, or sitting for more than six hours in an eight hour day. AR 35. The
25 light duty also excluded climbing ladders, rope, and scaffolding, "occasional for all
26 remaining postural activities, avoid concentrated exposure to temperatures, both cold and
27 heat, vibration, workplace hazards, such as dangerous machinery and unprotected
28 heights." *Id.*

1 The ALJ noted that at the March 15, 2011, exam Plaintiff reported his pain level to
2 be just a three out of ten, far less than before the second surgery. AR 36. The same exam
3 also found a full five out of five on lower extremity motor strength. *Id.* The ALJ further
4 discussed the April 12, 2011, exam when Plaintiff said he had improved leg and back pain
5 and was walking thirty minutes each day. *Id.* He also noted Dr. Tantuwaya found
6 Plaintiff to be stable, no longer disabled, recommended an exercise program, and
7 approved return to modified work. *Id.* The recommended modified work was to lift “no
8 more than 30 pounds or repetitive or prolonged bending, twisting, or stooping at the
9 waist.” *Id.* The ALJ discussed his further accommodation of these limitations with a
10 light work RFC assessment. *Id.*

11 The ALJ’s review of the May 17, 2011, exam acknowledged Plaintiff reported
12 lower back pain, and “tingling and numbness” in the left leg with prolonged standing but
13 no pain. *Id.* The ALJ also concluded that because Plaintiff stated the pain medication
14 worked for four to five hours that the pain was “no longer disabling.” *Id.* The ALJ
15 further noted that after April 2011, Plaintiff desired to work and that Dr. Tantuwaya
16 determined he was capable of modified work. *Id.* Lastly, the ALJ noted that the treatment
17 recommendations following the second surgery were relatively conservative, indicating
18 improvement, and that Plaintiff’s condition was no longer disabling. AR 37.

19 The ALJ concluded that Plaintiff is unable to perform past relevant work because
20 his former jobs were classified as medium to heavy assessments. *Id.* But, the ALJ found
21 Plaintiff capable of RFC consistent with light work. *Id.* Based on Mr. Kilcher’s
22 testimony on the availability of unskilled light work, the ALJ determined Plaintiff has
23 been capable of obtaining work that “exists in significant numbers in the national
24 economy” since April 12, 2011. AR 38. Therefore, he made the determination of not
25 disabled, beginning April 12, 2011. *Id.*

26 **II. Analysis**

27 **A. Standard of Review Regarding Substantial Evidence**

28 The Social Security Act provides for judicial review of a final agency decision

denying a claim for disability benefits. 42 U.S.C. § 405(g). A reviewing court must affirm the denial of benefits if the agency's decision is supported by substantial evidence and applies the correct legal standards. *Id.*; *Batson*, 359 F.3d at 1193. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If the evidence is susceptible to more than one reasonable interpretation, the agency's decision must be upheld. *Batson*, 359 F.3d at 1193. Further, when medical reports are inconclusive, questions of credibility and resolution of conflicts in the testimony are the exclusive functions of the agency. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (citing *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982)).

B. Assertion of Error: Rejection of Plaintiff's Subjective Testimony

In challenging the ALJ's denial of benefits, Plaintiff argues that the ALJ erred in rejecting his subjective testimony. (Dkt. No. 12 at 5.⁷) He claims the ALJ improperly "isolated the record" by noting that Plaintiff's pain level had reduced to three out of ten. *Id.* at 7. Further, he argues that his subjective testimony is supported by Dr. Lane's classification of his condition as "failed back syndrome" and the ALJ's acknowledgment that Plaintiff's back had not yet fused. *Id.* Plaintiff also alleges the ALJ did not offer any other reason to reject the testimony such as inconsistent testimony or conduct. *Id.*

A claimant's subjective symptoms must be considered in a disability evaluation. 20 C.F.R. § 404.1529(a); *Smolen v. Chater*, 80 F.3d 1273, 1291 (9th Cir. 1996). In deciding whether to credit a claimant's testimony about subjective symptoms or limitations, the ALJ must engage in a two-step analysis. *Batson*, 359 F.3d at 1196; *Smolen*, 80 F.3d at 1281. Under the first step, the claimant must produce objective medical evidence of an underlying impairment that could reasonably be expected to produce pain or other symptoms. *Batson*, 359 F.3d at 1196; *Smolen*, 80 F.3d at 1281. In this case, the ALJ found that Plaintiff's underlying impairments could produce his alleged symptoms, so this

⁷ References to page numbers in the parties' submissions refer to those assigned by the ECF system.

1 element is not an issue. *See* AR 33. If this first element is satisfied, and there is no
2 affirmative evidence that the claimant is malingering, then the ALJ must determine the
3 credibility of the claimant's subjective complaints.

4 In assessing the credibility of the claimant's subjective complaints, the ALJ may
5 consider such factors as the claimant's reputation for truthfulness, any inconsistencies in
6 the claimant's statements, and the claimant's daily activities. *Tonapetyan v. Halter*, 242
7 F.3d 1144, 1148 (9th Cir. 2001); *Smolen*, 80 F.3d at 1284. He may also consider the
8 objective medical evidence in the record along with Plaintiff's treatment history. *Smolen*,
9 80 F.3d at 1284. The ALJ may reject the claimant's testimony about the severity of
10 symptoms as long as he gives specific, clear, and convincing reasons for doing so.
11 *Batson*, 359 F.3d at 1196; *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007).
12 "General findings are insufficient; rather, the ALJ must identify what testimony is not
13 credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81
14 F.3d 821, 834. The ALJ's reasons for rejecting Plaintiff's subjective testimony must be
15 specific enough to allow this reviewing Court to conclude that "the ALJ did not arbitrarily
16 discredit [Plaintiff's] testimony." *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995)
17 (alteration in original). Where the claimant has proven a combination of impairments that
18 would result in some degree of limitation in his activity, and there is no evidence of
19 malingering, the Commissioner must provide "clear and convincing" evidence in order to
20 disregard the claimant's testimony on subjective symptoms. *Lester*, 81 F.3d at 834. If the
21 ALJ's credibility finding has substantial support in the record, this Court will not second
22 guess the opinion. *Thomas v. Barnhart*, 278 F.3d 947, 959.

23 Plaintiff alleged that he has leg pain and numbness after standing for twenty
24 minutes, and reported being unable to lift more than five to ten pounds. AR 59, 554. He
25 also testified he had difficulty sleeping, requiring two hour naps during the day to rest and
26 elevate his legs. AR 64, 65. The ALJ reviewed the record regarding Plaintiff's pain,
27 physical ability, improvement from surgery, and ability to work, and identified evidence
28 in the record undermining Plaintiff's complaints. AR 31-38.

1 The medical records support the ALJ's findings. Plaintiff's treating neurosurgeon,
2 Dr. Tantuwaya, based his opinions on multiple evaluations following Plaintiff's second
3 surgery. Plaintiff reported a relatively low pain level of three out of ten, and tested five
4 out of five on lower extremity motor strength. AR 36; AR 564-65. This was followed by
5 a subsequent exam when Plaintiff reported improvement with pain and was walking thirty
6 minutes daily. AR 559. At this appointment, Dr. Tantuwaya opined Plaintiff was stable,
7 not disabled, recommended exercise, and approved a return to work with limitations. AR
8 562. Plaintiff expressed that his pain medication worked for four to five hours and that he
9 desired to work. AR 554. The ALJ also observed that the back treatments had become
10 more conservative with use of exercise and a bone stimulator, but did not require any
11 additional surgery. AR 37; AR 557. Plaintiff's hearing testimony about pain severity and
12 limited activity appear to contradict his reports to Dr. Tantuwaya of low pain levels and
13 daily walking exercise. *Compare* AR 59-62, with AR 559, 564-65. Dr. Tantuwaya's
14 opinion of Plaintiff's recovery also undermines Plaintiff's testimony. Specifically, Dr.
15 Tantuwaya approved modified work in both the March and April appointments. AR 557,
16 562.

17 Consideration of Plaintiff's daily activities is proper when making an evaluation of
18 symptoms, including pain. *See* 20 C.F.R. § 404.1529(c)(3)(i). Differences between
19 Plaintiff's allegations and his conduct qualifies as substantial evidence that may be used in
20 a credibility determination. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).
21 Notably, Plaintiff reported to Dr. Tantuwaya that he performed core strengthening
22 exercises and "walk[ed] 30 minutes on his treadmill at home every day." AR 559
23 (alteration in original). But, the ALJ asked Plaintiff about Dr. Tantuwaya's recommended
24 walking exercise and Plaintiff responded "I can't do that every day." AR 62. Considering
25 these inconsistent statements are less than one month apart, they constitute evidence
26 showing the ALJ "did not arbitrarily discredit testimony." *Orteza*, 50 F.3d at 750.

27 Plaintiff's motion also calls attention to the September 21, 2011, agreed medical
28 evaluation by Dr. Lane. Plaintiff relies in part on this evaluation to support the credibility

1 of his testimony. (Dkt. No. 12 at 7.) This evaluation postdated the decision of the ALJ
2 but was considered by the Appeals Council. *See* AR 6, 24, 615.

3 The legal standard is unchanged by the introduction of new evidence. “If the ALJ’s
4 credibility finding *is* supported by substantial evidence in the record, we may not engage
5 in second-guessing.” *Thomas*, 278 F.3d at 959 (emphasis added). Judicial review
6 determining the existence of substantial evidence applies to the “final decision of the
7 Commissioner.” 42 U.S.C. § 405(g). The Appeals Council’s denial of a request for
8 review constitutes a final decision. *See* 20 C.F.R. §404.955; *Brewes v. Comm’r of Soc.*
9 *Sec. Admin.*, 682 F.3d 1157, 1162 (9th Cir. 2012). “[W]hen a claimant submits evidence
10 for the first time to the Appeals Council, which considers that evidence in denying review
11 of the ALJ’s decision, the new evidence is part of the administrative record, which the
12 district court must consider in determining whether the Commissioner’s decision is
13 supported by substantial evidence.” *Brewes*, 682 F.3d at 1159-60; *See also Harman v.*
14 *Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000) (citing *Ramirez v. Shalala*, 8 F.3d 1449, 1452
15 (9th Cir. 1993)) (reasoning that new evidence is part of the administrative record despite
16 an Appeals Council denial of review because the Council considered it in reaching its
17 decision). However, a medical opinion is less persuasive when it is given after an adverse
18 decision by the ALJ. *Weetman v. Sullivan*, 877 F.2d 20, 23 (9th Cir. 1989); *Vincent v.*
19 *Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (“After-the-fact psychiatric diagnoses are
20 notoriously unreliable.”); *See Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996).

21 This Court considered the newly submitted medical report, but finds it
22 unpersuasive. At the September 21, 2011 medical evaluation, Dr. Lane determined
23 Plaintiff’s spine had not fully fused and diagnosed “failed back syndrome.”⁸ AR 615.

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25 ⁸ Failed back syndrome is a medical term of art defined as chronic back or leg pain,
26 usually following surgery. NYU Langone Medical Center, *Failed Back Surgery*
27 *Syndrome*, [http://pain-medicine.med.nyu.edu/patient-care/conditions-we](http://pain-medicine.med.nyu.edu/patient-care/conditions-we-treat/failed-back-surgery-syndrome)
28 [-treat/failed-back-surgery-syndrome](http://pain-medicine.med.nyu.edu/patient-care/conditions-we-treat/failed-back-surgery-syndrome) (accessed June 11, 2014). This is not necessarily
inconsistent with Plaintiff’s RFC and ability to work. *E.g., Franco v. Colvin*, No. 1:12-
CV-01267-SMS, 2014 WL 790912, at *8 (E.D. Cal. Feb. 26, 2014) (noting the state
agency examining doctor found claimant capable of modified work despite a diagnosis of
failed back syndrome following a laminectomy, discectomy and fusion).

But, Plaintiff's report of "substantial problems bathing, dressing, standing, [and] sitting" is inconsistent with his previous statements and Dr. Tantuwaya's opinion. AR 562, 569. Specifically, Plaintiff's statements of walking 30 minutes daily and his doctor's approval to return to modified work contradict the medical report that followed the ALJ decision. AR 559, 562, 569. Like *Vincent*, the medical reports of Dr. Tantuwaya and Dr. Lane prior to the ALJ decision are more persuasive than the "after-the-fact" evidence submitted to the Appeals Council. *Vincent*, 739 F.2d at 1395.

The ALJ offered several clear and convincing reasons to justify his determination that Plaintiff's subjective description of his limitations and pain was not credible. He noted inconsistencies between Plaintiff's own statements, his daily activities, and Dr. Tantuwaya's medical opinion and reports. *See Tonapetyan*, 242 F.3d at 1148. Although there is some evidence that Plaintiff has some limitations and pain, the ALJ's finding has substantial support in the record. Accordingly, Plaintiff cannot sustain an objection to the opinion on this ground.

III. Conclusion

Based on the preceding discussion, this Court concludes that the ALJ's denial of benefits is supported by substantial evidence and is free of legal error. Therefore, the Court **RECOMMENDS** that Plaintiff's motion for summary judgment, (dkt. no. 12), be **DENIED** and that Defendant's cross motion for summary judgment, (dkt. no. 15), be **GRANTED**.

The undersigned submits this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) to the United States District Judge assigned to this case.


IT IS ORDERED that no later than **June 30, 2014**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **July 7, 2014**. The parties are advised that

1 failure to file objections within the specified time may waive the right to raise those
2 objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
3 1991).

4 **IT IS SO ORDERED.**

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6 DATED: June 16, 2014

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8 
9 Hon. Nita L. Stormes
U.S. Magistrate Judge
United States District Court